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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mark A. Krasemann; Beth Krasemann; Krasemann Vision Centers, Inc.; Krasemann Eye Center, Inc., Plaintiffs, vs. The United States of America; and Abe Reyes, Defendants.	No. CV07-2599-PHX-NVW **ORDER**

Pending before the court are the United States' Motion to Dismiss (doc. #37) and Plaintiffs' Petition for Temporary Restraining Order and Preliminary Injunction (doc. #38).

The United States' Motion to Dismiss (Doc. #37)

The United States' Motion to Dismiss seeks dismissal of all of Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction except for Plaintiff Beth Krasemann's and Plaintiff Krasemann Eye Center, Inc.'s claims against the United States under 26 U.S.C. § 7426 for wrongful levy. Although Plaintiffs' First Amended Complaint for Wrongful Tax Levy and Application for Preliminary and Permanent Injunction includes a brief listing of statutes that they assert confer jurisdiction upon the court, it makes no attempt to connect specific parties, claims, and factual allegations to

any of those statutes. The motion to dismiss moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, but much of the United States' motion requires the court to find Plaintiffs have failed to state a claim upon which relief can be granted before concluding that the court lacks subject matter jurisdiction because Plaintiffs have failed to plead a claim for which the United States has waived its sovereign immunity. "[W]hen a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." *Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir. 1979) (quoting *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 602 (9th Cir. 1976) and affirming dismissal as for failure to state a claim and as judgment on the merits). The court does not decide in this Order whether the allegations of the complaint are frivolous, but decides the motion to dismiss under Rule 12(b)(1) where appropriate and under Rule 12(b)(6) where appropriate.

I. Legal Standards for Dismissal Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

To avoid dismissal under Fed. R. Civ. P. 12(b)(6), a plaintiff must allege facts sufficient "to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations and footnote omitted).

A motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may either attack the allegations of the complaint ("a facial attack") or be made as a "speaking motion" attacking the existence of subject matter jurisdiction in fact ("a factual attack"). *Thornhill Pub. Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Although Defendants contend the court should not presume Plaintiffs' allegations to be true when they challenge the veracity of the jurisdictional facts underlying Plaintiffs' complaint, their motion is a facial attack, not a factual attack, and the court does not need to resolve any factual issues to decide the jurisdictional questions.

For the purposes of deciding issues under Rule 12(b)(1), the court presumes

Plaintiffs' factual allegations to be true, and the motion will be granted only if Plaintiffs have not set forth the elements necessary for subject matter jurisdiction. *See Doe v. Schachter*, 804 F. Supp. 53, 57 (N.D. Cal. 1992). After construing the factual allegations in the light most favorable to Plaintiffs, the court will dismiss a claim for lack of subject matter jurisdiction if: (1) the claim does not arise under federal law or the Constitution; (2) there is no case or controversy; or (3) the cause of action is not described in any jurisdictional statute. *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)). Plaintiffs bear the burden of proving the court has subject matter jurisdiction over this action. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

Sovereign immunity limits subject matter jurisdiction of the federal courts, and the United States, as sovereign, can be sued only to the extent it has waived its sovereign immunity. *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). The scope of a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Id.* Further, the absence of immunity does not confer subject matter jurisdiction. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007). To establish subject matter authority against a sovereign, the party asserting jurisdiction must prove statutory authority vests a district court with subject matter jurisdiction in addition to proving waiver of sovereign immunity *Id.*

II. Background

Plaintiff Mark Krasemann is an optometrist who in 2007 entered into a settlement agreement with the Internal Revenue Service of the United States ("IRS") for his personal income tax liabilities for tax years 1999 through 2002. To collect amounts Mark Krasemann stipulated were due, the IRS levied Beth Krasemann's wages and Krasemann Eye Center, Inc.'s accounts receivable. Based on the First Amended Complaint, the court assumes the following facts to be true for the purpose of deciding the motion to dismiss.

Krasemann Vision Centers, Inc., and Krasemann Eye Center, Inc., are corporations doing business in Mesa, Arizona. Plaintiffs have not pled when these entities were incorporated, filed tax returns, or paid taxes.

On November 1, 2003, Mark Krasemann and Beth Krasemann signed a property settlement agreement, which was recorded on November 14, 2003. Plaintiffs allege that, as a result of the agreement, Beth Krasemann's wages are not community property.

On December 1, 2005, and March 14, 2006, Revenue Officer Abe Reyes sent materials to James J. Everett, Plaintiffs' counsel in this action, with cover letters stating they were sent to Everett under the provisions of a power of attorney or other authorization on file with the IRS for Mark Krasemann. On April 28, 2006, Everett submitted to the IRS two copies of Form 2848, Power of Attorney, on which Mark Krasemann appointed Everett to represent Krasemann Vision Centers, Inc., and Mark Krasemann before the IRS with respect to specific tax matters identified on the forms.

On May 15, 2007, the United States Tax Court entered decisions pursuant to an agreement between Mark Krasemann and the IRS for Mark Krasemann's personal income tax liabilities for tax years 1999, 2000, 2001, and 2002. On July 13, 2007, Reyes contacted Mark Krasemann at Krasemann's office. According to Krasemann, Reyes erroneously informed him that neither Mark Krasemann nor Krasemann Vision Centers, Inc., were represented by Everett, and Reyes threatened and coerced Mark Krasemann to discuss tax matters for both Mark Krasemann individually and Krasemann Vision Centers, Inc. Plaintiffs allege that Reyes "untruthfully asserted that Dr. Krasemann advised Officer Reyes that he was operating Krasemann Eye Center, Inc., as a sole proprietorship."

On August 21, 2007, the IRS issued a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320 to Mark Krasemann, which indicated the IRS had filed with the County Recorder a Notice of Federal Tax Lien on 8/21/2007 and included a copy of the Notice of Federal Tax Lien. The Notice states the amounts owed by Mark Krasemann for 1040 taxes were $21,671.38 for the tax period ending 12/31/1999, $33,743.96 for the tax period ending 12/31/2000, $43,131.38 for the tax period ending 12/31/2001, and $41,868.98 for the tax period ending 12/31/2002, for a total of $140,415.62. The date of assessment for each of the tax periods is 6/25/2007.

On August 30, 2007, Everett submitted a Request for a Collection Due Process or Equivalent Hearing on behalf of Mark Krasemann. The basis for the hearing request is indicated as "Filed Notice of Federal Tax Lien."

On September 3 and 10, 2007, the IRS notified Mark Krasemann that it intended to levy for interest he owed for 1999, 2000, 2001, and 2002 taxes. On each of the four notices, no amount is printed after the words "Current Balance," but an amount is entered after "Interest." The total of the "Interest" amounts is $2,204.42.

On September 17, 2007, the IRS issued a Notice of Levy to Vision Service Plan, which identified the taxpayer as Mark Krasemann d/b/a "Drasemann [sic] Eye Center Inc." The notice identified amounts owed as Form 1040 tax for tax periods ending 12/31/1999, 12/31/2000, 12/31/2001, and 12/31/2002, which totaled $177,475.25. Approximately $7,366.40 was levied. Plaintiffs allege this levy was issued without proper due diligence and confirmation regarding whether Krasemann Eye Center, Inc., was a sole proprietorship or corporation and whether it was the correct taxpaying entity.

On September 17, 2007, the IRS also issued a Notice of Levy on Wages, Salary, and Other Income on CIGNA HealthCare of AZ, Inc., which identified the taxpayer as Mark Krasemann. The notice identified amounts owed as Form 1040 tax for tax periods ending 12/31/1999, 12/31/2000, 12/31/2001, and 12/31/2002, which totaled $177,475.25. The notice also stated, "Note: This levy attaches to the ½ community property interest of Mark A Kraseman [sic] on the wages of Beth A Krasemann." In the section to be completed by the taxpayer, Beth Krasemann is identified as the taxpayer, and a box is checked indicating that her filing status for her income tax return is "Married Filing a Joint Return."

With a cover letter dated September 25, 2007, Everett sent a check from Mark Krasemann to the IRS in the amount of $2,204.42.

On October 22, 2007, the IRS issued a second Notice of Levy on Wages, Salary, and Other Income on CIGNA HealthCare of AZ, Inc., which identified the taxpayer as Mark Krasemann. The notice states the total amount due is $170,108.87. As of the date

the First Amended Complaint was filed, approximately $1,404.59 of Beth Krasemann's wages had been levied.

By letter dated November 8, 2007, Everett notified the IRS Appeals Office that the Krasemanns had executed a property settlement agreement through which the parties agreed that wages earned during their marriage are characterized as separate property, and therefore Beth Krasemann's wages should not be subject to the separate income tax liability of Mark Krasemann. Everett requested immediate release of the levy on Beth Krasemann's wages, but the Appeals Officer declined to do so.

By letter dated December 6, 2007, Everett notified the IRS Director of Collections for the Western Area that approximately $8,334.12 had been wrongfully levied from assets of Krasemann Vision Centers, Inc.,[1] and Beth Krasemann's wages, and their fees for services rendered as a result of the levies was approximately $35,500.00. Plaintiffs allege Everett's December 6, 2007 letter constitutes a formal administrative claim for damages as a result of wrongful tax levies pursuant to 26 U.S.C. § 7433's requirement that a taxpayer exhaust his administrative remedies prior to filing suit.

On December 19, 2007, Krasemann Vision Centers, Inc., filed a bankruptcy petition, which Plaintiffs refer to in their response to the motion to dismiss, but did not mention in their Complaint or First Amended Complaint.

On December 21, 2007, Plaintiffs Mark Krasemann, Beth Krasemann, Krasemann Vision Centers, Inc., and Krasemann Eye Center, Inc., commenced this litigation against the United States and IRS Revenue Officer Reyes. On March 6, 2008, the IRS issued a Release of Levy/Release of Property from Levy, releasing the Levy on Beth Krasemann's wages.

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[1] Although Everett's letter attached as an exhibit to the Complaint states the assets of Krasemann Vision Centers, Inc., were levied, the First Amended Complaint alleges the levy was issued on Krasemann Eye Center, Inc.

On March 18, 2008, Plaintiffs filed a First Amended Complaint for Wrongful Tax Levy and Application for Preliminary and Permanent Injunction (doc. #22), alleging six counts:

Count I:	Revenue Officer Reyes Engaged in Harassing and Embarrassing Ex-Parte Communication with a Party Known to Be Represented by Counsel and Misstated and Mischaracterized the Substance of the Communications
Count II:	Illegally Issued Federal Tax Levy on Vision Service Plan
Count III:	Illegally Issued Federal Tax Levy on the Income of Beth Krasemann
Count IV:	Revenue Officer Abe Reyes Acted Outside the Scope of His Employment and as Such Should Be Personally Liable for His Harassing, Unethical, and Illegal Actions
Count V:	Conversion
Count VI:	Application for Preliminary and Permanent Injunction

Plaintiffs request a hearing on their application for a preliminary injunction "enjoining the Defendant and its agents from levying Plaintiffs' wages or other property of the Plaintiffs until further order of the Court" and an order "[p]ermanently enjoining the Defendant and its agents from levying or seizing upon Plaintiffs' property." To justify injunctive relief, Plaintiffs allege the following:

> Defendants' levies on Plaintiff Krasemann Eye Center, Inc., and on Plaintiff Beth Krasemann's wages cause, and would continue to cause, irreparable injury. If said levies are not removed, Plaintiff Dr. Mark Krasemann will continue to be unable to pay himself a salary, will be unable to pay his employees, and will lose his business, as well as his job. Additionally, Plaintiff Dr. Krasemann will be unable to afford suitable living quarters for himself, his wife and their two minor children, and Plaintiffs, Dr. Krasemann and Beth Krasemann, will be unable to live and pay their reasonably ordinary and necessary living expenses. Plaintiffs' real property, as well as Plaintiff Dr. Mark Krasemann's job, are both unique and cannot be duplicated or the loss fully compensated by a damage award.

(Doc. #22 at 15, ¶ XXIX.) In their Petition for Temporary Restraining Order and Preliminary Injunction, Plaintiffs acknowledge the levies have been released. (Doc. #38 at 2.)

In both their April 24, 2008 response to the motion to dismiss and April 18, 2008 petition for injunctive relief, Plaintiffs allege that on March 4, 2008, Reyes served a summons on JP Morgan Chase Bank for records of Krasemann Vision Centers, Inc., and Krasemann Eye Center, Inc., and that the summons demonstrates "continuing illegal collection action" and violates the automatic stay afforded to bankruptcy debtor Krasemann Vision Centers, Inc. (nka CVK, Inc.) by 11 U.S.C. § 362(a). (Doc. ## 40 at 3 n.1, 38-2 at 3 n.1, 9.) In CVK, Inc.'s bankruptcy case, on May 2, 2008, the debtor informed that court that Reyes withdrew the summons for bank records as a result of CVK, Inc.'s April 10, 2008 motion for contempt against Reyes filed in Case No. BK-07-6949.

On April 8, 2008, Krasemann Eye Center, Inc., filed a Petition to Quash Summons in separate action, Case No. MC-08-39-PHX-FJM. On April 22, 2008, Krasemann Eye Center, Inc., filed notice that the IRS summons to JP Morgan Chase Bank had been cancelled on April 21, 2008. That case was terminated on May 8, 2008, by an order finding the parties had resolved the entire dispute and dismissing the case as moot. (Doc. #12 in MC-08-39-PHX-FJM.)

Plaintiffs' Reply to Defendant United States' Response to Plaintiffs' Petition for Temporary Order filed May 8, 2008, does not correct their previous representation that the IRS bank records summons demonstrates continuing collection activity. In fact, the Reply expressly states, "As Plaintiffs have demonstrated in their Petition for Temporary Restraining Order and Memorandum in Support thereof, injunctive relief is necessary to stop Defendant, Revenue Officer Reyes from engaging in continued wrongful collection action." (Doc. #46 at 5-6.)

On May 21, 2008, the United States Bankruptcy Court for the District of Arizona, Case No. BK-07-6949, granted the Trustee's Motion to Dismiss CVK, Inc.'s bankruptcy

case upon finding: "The debtor is a defunct corporation in which it and its principal are involved in a United States District Court action with the IRS. The debtor has no assets and because it is a corporation it is not entitled to a chapter 7 discharge."

III. Statutory Authorization for the Court's Subject Matter Jurisdiction

A. Waiver of Sovereign Immunity by the United States

Because Plaintiffs have alleged both tax-related claims and tort claims, the court must determine whether the United States has waived its sovereign immunity for each of the types. First, under 28 U.S.C. § 1346(a)(1), the district courts have original jurisdiction of "[a]ny civil action against the United States for recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Second, under 28 U.S.C. § 1346(b)(1), the district courts have exclusive jurisdiction of civil actions on claims against the United States for money damages for injury to or loss of property or personal injury caused by the negligent or wrongful act or omission of any federal employee while acting within the scope of his office or employment.

B. Tax-Related Actions by Taxpayers

A taxpayer may bring a civil action for damages against the United States in a United States district court under 26 U.S.C. § 7433 or § 7432. A taxpayer may bring an action under § 7433(a) if, in connection with any collection of federal tax with respect to the taxpayer, any officer or employee of the Internal Revenue Service disregards any provision of the Internal Revenue Code or regulations promulgated under the Internal Revenue Code. 26 U.S.C. § 7433(a). "[S]uch civil action shall be the exclusive remedy for recovering damages resulting from such actions" except as provided in § 7432. *Id.* A taxpayer may bring an action under § 7432 for actual, direct damages sustained by the taxpayer if any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under § 6325 on the taxpayer's property. 26

U.S.C. § 7432(a), (b)(1). The parties agree Plaintiff Mark Krasemann is the only "taxpayer" in this lawsuit, and Plaintiffs do not request relief under § 7432.

C. Tax-Related Actions by Non-Taxpayers

"If a levy has been made on property ..., any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States." 26 U.S.C. § 7426(a)(1). The parties agree that under § 7426(a)(1) Beth Krasemann is permitted to sue the United States to challenge the levy of her CIGNA wages and Krasemann Eye Center, Inc., is permitted to sue the United States to challenge the levy of its Vision Service Plan accounts receivable.

Relief for an action brought under § 7426(a)(1) includes a judgment for the amount of money levied upon and an injunction to prohibit the enforcement of a levy or to prohibit a sale that would irreparably injure rights in property that the court determines to be superior to right of the United States in such property. 26 U.S.C. § 7426(b)(1), (b)(2). Section 7426(d) expressly prohibits an action against any officer or employee of the United States with respect to any acts for which an action could be maintained under this section.

D. Prohibition of Suits to Restrain Assessment or Collection

The Anti-Injunction Act, 26 U.S.C. § 7421, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed," except as provided in specific statutes, including §§ 7426(a) and (b)(1). The statute also prohibits actions for the purpose of restraining the assessment or collection of the amount of liability of a transferee of property of a taxpayer in respect of any internal revenue tax. 26 U.S.C. § 7421(b)(1).

E. Tort Claims

Under the Federal Tort Claims Act ("FTCA"), the United States waives its immunity for suits alleging certain common law torts by federal officials acting within the scope of their employment. 28 U.S.C. § 2674. Under the FTCA, a claimant may not institute an action until after presenting a claim to the appropriate federal agency and receiving a final denial of the claim. 28 U.S.C. § 2675(a). The remedy against the United States provided by 28 U.S.C. § 1346(b) for injury arising from the negligent or wrongful act of any federal employee while acting within the scope of his employment is exclusive of any other civil action for money damages against the employee whose act gave rise to the claim. 28 U.S.C. § 2679(b). Any civil action for money damages arising out of the same subject matter against the employee is precluded unless the action is for a constitutional violation or authorized under a different statute. *Id.* Waiver of sovereign immunity under § 1346(b) does not apply to any claim arising out of the assessment or collection of any tax except for a claim based on injury or loss of goods, merchandise, or other property while in the possession of a federal officer. 28 U.S.C. § 2680(c).

IV. Analysis

The United States and IRS Revenue Officer Abe Reyes move for (a) dismissal of all claims against Reyes, (b) dismissal of all claims against the United States except for Krasemann Eye Center, Inc.'s and Beth Krasemann's § 7426 wrongful levy claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, (c) denial of injunctive relief until a time after the parties have completed discovery, and (d) award of costs and fees. As explained above, Plaintiffs bear the burden of establishing the court's subject matter jurisdiction, and to establish subject matter authority against the United States, Plaintiffs must also prove waiver of sovereign immunity. In order to prove subject matter jurisdiction and waiver of sovereign immunity for any of their claims, Plaintiffs must allege facts that actually state a claim. Although the First Amended Complaint does not identify which claims are alleged by which Plaintiffs against which Defendant, Plaintiffs argue in their response to the motion to dismiss that Defendants err by grouping all

Plaintiffs in the same category. For the sake of clarity, the court will analyze whether the court has subject matter jurisdiction over claims by each Plaintiff against each Defendant.

A. Claims Against the United States

1. Claims by Mark Krasemann

The First Amended Complaint does not state any claims by Mark Krasemann against the United States. He stipulated to the amounts he owes the IRS, Plaintiffs claim none of the assets levied were his property, and Plaintiffs assert that the IRS applied the levied monies as payment towards Mark Krasemann's separate tax liability, and thus, Mark Krasemann does not have a conversion claim. Further, Plaintiffs acknowledge Mark Krasemann may not sue the United States under 26 U.S.C. § 7426, which permits a wrongful levy action by someone other than the person against whom the tax is assessed.

Regarding unauthorized collection actions, the parties agree Mark Krasemann is the only "taxpayer" under the statutes relevant to this lawsuit, and therefore he is the only one permitted to bring a civil action under 26 U.S.C. § 7433(a) for damages against the United States. Under § 7433(b)(1), damages are limited to "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee." Plaintiffs have not alleged Mark Krasemann sustained any actual, direct economic damages proximately caused by any unauthorized collection actions.

Section 7433(a) provides that, except as provided in § 7432, a civil action under § 7333 is the exclusive remedy for recovering damages if, "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of [Title 26] or any regulation promulgated under [Title 26]." Because § 7432 does not apply, and Plaintiffs have affirmatively stated they do not seek relief under § 7432, Mark Krasemann's exclusive remedy for damages against the United States is an action under § 7433.

Section 7433(d)(1) requires that administrative remedies be exhausted. Although the First Amended Complaint alleges "Plaintiffs have exhausted their administrative remedies" by submitting a written damage claim pursuant to Treas. Reg. 301-7433-1(e) on December 6, 2007, they now contend in response to the motion to dismiss that the exhaustion requirement applies only to Mark Krasemann because he is the only taxpayer, and Beth Krasemann's and Krasemann Eye Center, Inc.'s claims arise under § 7426, which does not require exhaustion of administrative remedies. Treas. Reg. 301-7433-1(a) expressly provides, "An action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim pursuant to paragraph (e) of this section, and has waited for the period required under paragraph (d) of this section." Paragraph (d) provides that no action shall be maintained in any federal district court before the earlier of a decision on the administrative claim or six months after the administrative claim was filed except if the administrative claim is filed within the last six months of the two-year limitations period. Plaintiffs concede they initiated this action only fifteen days after submitting their administrative claim.

Plaintiffs argue an exception to the exhaustion requirement applies because they "have clearly demonstrated continuous requests for relief from Revenue Officer Reyes' wrongful collection action were futile and the Plaintiffs' interest in immediate judicial review outweigh[s] the government's interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." However, the cases Plaintiffs cite do not support their argument. *See Glass v. United States*, 424 F. Supp. 2d 224, 227-29 (D.D.C. 2006) (exhaustion requirement of § 7433 is jurisdictional)*; Amato v. Bernard*, 618 F.2d 559, 566-69 (9th Cir. 1980) (although ERISA text nowhere mentions the exhaustion doctrine, federal courts have authority to enforce the exhaustion requirement in ERISA suits, and as a matter of sound policy, they usually should do so except when "resort to the administrative route is futile or the remedy inadequate"). Even if an exception to § 7433's express exhaustion requirement were permitted, Plaintiffs have not shown that compliance with the procedures established in Treas. Reg.

301.7433-1(e) would have been futile. Therefore, Plaintiffs have failed to state any claim or prove subject matter jurisdiction over any claim by Mark Krasemann against the United States for damages resulting from wrongful tax collection.

Plaintiffs also have failed to state any claim or prove subject matter jurisdiction over any claim by Mark Krasemann against the United States for injunctive relief. Plaintiffs acknowledge that § 7421 prohibits suits for injunctive relief restraining the assessment or collection of any tax except under specific statutes and that Mark Krasemann may not seek injunctive relief under § 7426 because that section authorizes actions by persons other than taxpayers. Instead, Plaintiffs argue that Mark Krasemann's and Krasemann Vision Centers, Inc.'s claims fall within a different exception to § 7421, *i.e.*, § 6330(e). But the First Amended Complaint refers to § 6330 only regarding the levy against Krasemann Eye Center, Inc.'s accounts receivable. Although § 6330(e)(1) provides that "levy actions which are the subject of a requested hearing ... shall be suspended for the period during which such hearing, and appeals therein, are pending," the only hearing Mark Krasemann requested expressly regarded the notice of filing federal tax liens, not levy actions, and was requested pursuant to § 6320, not § 6330. Section 6320 does not suspend any proceedings pending hearing. Plaintiffs do not allege that any of them filed a request for Collection Due Process Hearing regarding the notices of levy or that it would have been proper for Mark Krasemann individually to have requested a levy hearing since the levied assets did not belong to him. Thus, the § 6330(e) exception to § 7421 does not apply to Mark Krasemann individually or to any of the Plaintiffs.

Plaintiffs also argue they fall within a judicially created exception to § 7421 defined in *Enochs v. Williams Packing & Navigation, Co.*, 370 U.S. 1, 7 (1962):

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and ... the attempted collection may be enjoined if equity jurisdiction otherwise exists.

> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. ... Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid.

Even assuming all of Plaintiffs' factual allegations to be true, this exception could not apply to Mark Krasemann because he admits his tax liability and has no cause of action for alleged violations of internal IRS procedures.

Therefore, Plaintiffs have failed to state any claim and failed to prove the court has subject matter jurisdiction over any claim by Mark Krasemann against the United States.

2. Claims by Beth Krasemann

Plaintiffs concede Beth Krasemann may not seek relief under § 7433. Further, Plaintiffs do not identify any statute that provides the court with subject matter jurisdiction over conversion claims by any of the Plaintiffs against the United States. If they intended to bring a conversion claim under the FTCA, they failed to address why 28 U.S.C. § 2680(c)'s explicit bar on claims "arising in respect of the assessment or collection of any tax" does not prohibit conversion claims by all of the Plaintiffs. Plaintiffs argue instead that their conversion claim should not be dismissed because Reyes was acting outside the scope of his employment and therefore 28 U.S.C. § 2679(b)(1) does not exclude it. This argument, coupled with a complete failure to allege any basis for a claim against the United States, concedes lack of subject matter jurisdiction over any conversion claim against the United States.

Defendants acknowledge the court has subject matter jurisdiction over any claims by Beth Krasemann against the United States under § 7426 for wrongful levy based on the IRS levy on her CIGNA wages for taxes owed by Mark Krasemann. Plaintiffs do not allege or argue any other basis for claims by Beth Krasemann against the United States. Therefore, Plaintiffs have failed to state a claim and failed to prove the court has subject matter jurisdiction over any claim by Beth Krasemann against the United States except

for a § 7426(a)(1) claim for wrongful levy, which the United States acknowledged in its motion to dismiss.

Although Beth Krasemann has stated a claim for recovering amounts wrongfully levied pursuant to § 7426(a)(1) and (b)(2)(B), she has not alleged a basis for injunctive relief to prevent irreparable injury to property rights under § 7426(b)(1) or under the *Enochs v. Williams Packing* exception to § 7421's prohibition of injunctive relief. The court cannot conclude that "under no circumstances could the Government ultimately prevail" against Beth Krasemann. The United States may be able to prove the Krasemanns' actions invalidated their 2003 marital property agreement and its enforceability against the United States or that it is ineffective as against community debts existing before the agreement was made. Thus, under some circumstances, the United States may prevail on Beth Krasemann's § 7426 claim for wrongful levy.

3. Claims by Krasemann Eye Center, Inc.

As explained above, Plaintiffs concede Krasemann Eye Center, Inc., does not have a § 7433 claim or a conversion claim against the United States. In Count II (Illegally Issued Federal Tax Levy on Vision Service Plan), Plaintiffs allege that the IRS levy on Krasemann Eye Center, Inc.'s Vision Service Plan accounts receivable violated Mark Krasemann's due process rights because he had filed a Request for Collection Due Process or Equivalent Hearing for a Notice of Tax Lien and the IRS should have suspended its levy action until the requested hearing was completed. However, Mark Krasemann's hearing request was made under § 6320, which does not suspend collection proceedings. Plaintiffs also allege that the levy was improper because Krasemann Eye Center, Inc., is "a separate and distinct taxpayer and taxpaying entity." If Mark Krasemann and Krasemann Eye Center, Inc., are distinct, Count II does not allege a constitutional due process violation on behalf of either party because Mark Krasemann requested the hearing regarding a tax lien on his property and Krasemann Eye Center, Inc., did not request a hearing regarding the IRS levy of its assets.

Therefore, Plaintiffs have failed to state a claim and failed to prove the court has subject matter jurisdiction over any claim by Krasemann Eye Center, Inc., against the United States except under § 7426(a)(1) for wrongful levy based on the IRS levy on its Vision Service Plan accounts receivable, which the United States acknowledged in its motion to dismiss. Although Krasemann Eye Center, Inc., has stated a claim for recovering amounts wrongfully levied pursuant to § 7426(a)(1) and (b)(2)(B), it has not alleged a basis for injunctive relief to prevent irreparable injury to property rights under § 7426(b)(1) or under the *Enochs v. Williams Packing* exception to § 7421's prohibition of injunctive relief. The court cannot conclude that "under no circumstances could the Government ultimately prevail" against Krasemann Eye Center, Inc. The United States may be able to prove Mark Krasemann transferred his individual assets to Krasemann Eye Center, Inc., incorporated in March 2006, for the purpose of avoiding his individual federal tax obligations for tax years 1999-2002. Thus, under some circumstances, the United States may prevail on Krasemann Eye Center, Inc.'s § 7426 claim for wrongful levy.

4. Claims by Krasemann Vision Centers, Inc.

As explained above, Plaintiffs concede Krasemann Vision Center, Inc., does not have a § 7433 claim or a conversion claim against the United States.

The First Amended Complaint does not allege that the IRS levied upon or wrongfully collected from any assets of Krasemann Vision Centers, Inc. It does not allege that any IRS notices were issued to Krasemann Vision Centers, Inc., or that Krasemann Vision Centers, Inc., requested any hearing from the IRS. The only allegations regarding Krasemann Vision Centers, Inc., pled by Plaintiffs are (1) Everett submitted a Form 2848 to represent Krasemann Vision Centers, Inc., before the IRS regarding specific tax matters and (2) on July 13, 2007, Reyes erroneously informed Mark Krasemann that Everett did not represent Krasemann Vision Centers, Inc., and coerced Krasemann to discuss tax matters regarding Krasemann Vision Centers, Inc. On the allegations of the First Amended Complaint, therefore, Krasemann Vision Centers,

Inc., has pled only Count I: Revenue Officer Reyes engaged in harassing and embarrassing ex-parte communication with a party known to be represented by counsel and misstated and mischaracterized the substance of the communications.

In their response to the motion to dismiss, Plaintiffs do not contend that Krasemann Vision Centers, Inc., has claims for damages against the United States for wrongful collections, wrongful levy, or conversion. Plaintiffs argue only that Krasemann Vision Centers, Inc., falls within the § 6330(e) exception to § 7421's general prohibition of restraints on tax collection because Plaintiffs had requested a hearing and is entitled to bring a wrongful levy action against the United States. However, Krasemann Vision Centers, Inc., never requested a hearing, never was subject to a tax lien or levy, and asserts no statutory authority under which it may sue the United States for "harassing and embarrassing ex-parte communication" by an IRS revenue officer. Plaintiffs do not allege any facts that would suggest Krasemann Vision Centers, Inc., needs injunctive relief.

Thus, Plaintiffs have failed to state a claim and failed to prove the court has subject matter jurisdiction over any claim by Krasemann Vision Centers, Inc., against the United States.

The only claims against the United States Plaintiffs can pursue in this action, therefore, are Beth Krasemann's and Krasemann's Eye Center, Inc.'s § 7426(a) wrongful levy claims. The only relief they may seek is a judgment under § 7426(b)(2)(B) for the amount of money levied upon.

B. Claims Against Revenue Officer Abe Reyes

Two of the six counts pled in the First Amended Complaint are asserted against Reyes personally.[2] Count I is titled, "Revenue Officer Reyes Engaged in Harassing and Embarrassing Ex-Parte Communication with a Party Known to Be

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[2] Plaintiffs are expressly prohibited from asserting any § 7426 wrongful levy claim against any officer or employee of the United States. 26 U.S.C. § 7426(d).

Represented by Counsel and Misstated and Mischaracterized the Substance of the Communications." Count IV is titled, "Revenue Officer Abe Reyes Acted Outside the Scope of His Employment and as Such Should Be Personally Liable for His Harassing, Unethical, and Illegal Actions." Plaintiffs allege Reyes abused his position as a Revenue Officer, disregarded the rules and procedures contained in the Internal Revenue Manual and the Internal Revenue Code, and continues to be harassing, unethical, and illegal with respect to Plaintiffs. The only relief sought that appears to apply to Reyes is holding him in contempt for illegal collection activity.

If any IRS officer or employee recklessly, intentionally, or negligently disregards any provision of the Internal Revenue Code or regulation in connection with any collection of federal tax with respect to a taxpayer, the exclusive remedy for recovering damages is a civil action for damages brought by the taxpayer in federal district court against the United States, not the officer or employee. 26 U.S.C. § 7433(a). Plaintiffs may not bring a claim under the FTCA because the FTCA excludes claims arising out of tax collections, Plaintiffs did not exhaust their administrative remedies, and they may not bring a claim against a federal employee for money damages for a negligent or wrongful act while acting within the scope of his employment unless the action involves a constitutional violation or is authorized under a different statute. 28 U.S.C. §§ 2675(a), 2680(c), 2679(b). Even if Reyes' alleged conduct constituted a constitutional violation, *Bivens* relief for personal liability of government officials is not available for alleged constitutional violations by IRS officials involved in the process of assessing and collecting taxes. *Adams v. Johnson*, 355 F.3d 1179, 1186 (9th Cir. 2004).

For purposes of the motion to dismiss, the court is not required to accept Plaintiffs' legal assertion that Reyes acted outside the scope of his employment, but if even if the court were to agree with legal conclusion, Plaintiffs still would be lacking any authority establishing the court's subject matter jurisdiction over their claims against Reyes personally. They have cited no authority that claims for "harassing and embarrassing ex-parte communication" and "harassing, unethical, and illegal actions" arise under federal

law or the United States Constitution or that any statute grants the court jurisdiction over such claims against Reyes personally.

Thus, whether Reyes acted within or outside the scope of his employment, Plaintiffs have failed to state a claim and failed to prove the court has subject matter jurisdiction over any claim against Reyes personally. In any event, it is plain to a legal certainty that Reyes' alleged acts were within the scope of his employment, and Plaintiffs' conclusory allegation to the contrary is frivolous.

C. Award of Attorneys' Fees and Costs

Defendants request award of costs and fees, but do not provide authority and justification for such an award. Therefore, the court will deny the request at this time without prejudice. Aspects of the dismissed claims are objectively frivolous. The United States is not precluded from seeking award of attorneys' fees at the conclusion of this case.

Plaintiffs' Petition for Temporary Restraining Order and Preliminary Injunction (Doc. #38)

In addition to their Application for Preliminary and Permanent Injunction included in the First Amended Complaint, Plaintiffs separately filed a "Petition for Temporary Restraining Order and Preliminary Injunction." The Petition requests that the court issue a temporary restraining order pending a hearing and award of relief preliminarily and permanently enjoining the United States and Reyes from issuing further levies or taking further collection against Plaintiffs and to return all wrongfully levied monies to Plaintiffs pending the Court's ruling on the merits. (Doc. #38 at 2.) As previously noted, the levies have been lifted, and the only alleged "continued collection action" has been terminated.

No evidentiary hearing on Plaintiffs' petition for injunctive relief is required because it presents only purely legal questions and no purpose would be served by holding an evidentiary hearing. *See United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983); *Socialist Workers Party v. Illinois State Bd. of Elections*, 566 F.2d 586, 586 (7th

Cir. 1977). Even if Plaintiffs were to prove all of their factual allegations to be true, they have shown no legal basis for granting any of the injunctive relief they have requested.

Plaintiffs concede 26 U.S.C. § 7421 prohibits any of the injunctive relief they seek unless they can satisfy an exception. As explained above, none of the Plaintiffs meet the judicially created exception under *Enochs v. Williams Packing*.

Plaintiffs seek injunctive relief for Beth Krasemann and Krasemann Eye Center, Inc., under 26 U.S.C. § 7426(b)(1), which permits an injunction if a levy or sale would irreparably injure rights in property that the court determines to be superior to rights of the United States in such property. Plaintiffs admit the levies have been released. Plaintiffs do not allege that either Beth Krasemann or Krasemann Eye Center, Inc., have suffered or are likely to suffer irreparable injury to their rights in any property. Plaintiffs do not even expressly allege that Beth Krasemann and Krasemann Eye Center, Inc., have been deprived of their money that has been applied to Mark Krasemann's separate tax debt. To qualify for injunctive relief under an exception to § 7421, parties still must satisfy the usual equitable prerequisites to injunctive relief, *i.e.*, irreparable injury and lack of adequate legal remedy. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1981). If Beth Krasemann or Krasemann Eye Center, Inc., prevail on proving their wrongful levy claims, they will have adequate legal remedy under § 7426(b)(2)(B) and, therefore, cannot obtain injunctive relief under § 7426(b)(1).

Plaintiffs seek injunctive relief for Mark Krasemann and Krasemann Vision Centers, Inc., under 26 U.S.C. § 6330(e), which suspends levy actions that are the subject of a requested hearing. As discussed above, Mark Krasemann requested a hearing regarding tax liens under § 6320, which does not suspend liens or any other collection action. Plaintiffs did not allege that Krasemann Vision Centers, Inc., requested any hearing. Plaintiffs do not allege the IRS wrongfully levied any property belonging to Mark Krasemann or Krasemann Vision Centers, Inc. In fact, Plaintiffs acknowledge the assets levied were applied to Mark Krasemann's separate tax debt. Therefore, neither

Mark Krasemann or Krasemann Vision Centers, Inc., can obtain injunctive relief under § 6330(e).

Plaintiffs have not alleged any specific irreparable injury that would result if an injunction is not issued. They allege only that as a result of the levy against Beth Krasemann in the amount of approximately $1,404.59[3] and the levy against Krasemann Eye Center, Inc., in the amount of approximately $7,366.40, Mark Krasemann was unable to pay himself a salary, the Krasemanns have filed for a divorce, Mark Krasemann will be unable to run his business, and Plaintiffs will be unable to pay necessary living expenses. They argue "[t]here is no immediate adequate remedy at law to allow Plaintiffs to keep their property and allow Plaintiff Mark Krasemann to be able to pay reasonable ordinary and necessary living expenses, pay himself a salary and pay his employees, which will result in a failure to maintain his business and keep his job." (Doc. #38-2 at 14.) These alleged "injuries" would affect only Mark Krasemann, who admittedly owes the tax debt.

Plaintiffs' Reply to Defendant United States' Response to Plaintiffs' Petition for Temporary Restraining Order includes four exhibits apparently for the purpose of demonstrating likelihood of Plaintiffs prevailing on the merits. (Doc. #46.) Exhibits A and B show that Krasemann Eye Center, Inc., was organized on March 20, 2006; Mark Krasemann is its sole Board member, its incorporator, President, Secretary, and Treasurer, and do not indicate how the corporation was capitalized. Exhibit C is a copy of Krasemann Eye Center, Inc.'s 2007 U.S. Income Tax Return for an S Corporation. It shows Mark Krasemann holds 100% of stock ownership for Krasemann Eye Center, Inc. Exhibit D is an Affidavit of Mark Krasemann dated May 7, 2008, swearing that he and Beth Krasemann kept all of their assets, including wages, separate from the time they married on December 1, 2001, through the present date, and at no time commingled their separate assets. Although Defendants did not have opportunity to respond to exhibits

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[3] In their Petition for Temporary Restraining Order and Preliminary Injunction, Plaintiffs state approximately $4,549.47 was levied from Beth Krasemann's wages, but cite only to Exhibit L of their Complaint, which the First Amended Complaint cited as showing that approximately $1,404.59 had been levied "to date." (Doc. #38-2 at 8.)

attached to Plaintiffs' Reply, it is unnecessary for them to do so because the exhibits do not affect any of the court's rulings in this Order.

Therefore, none of the Plaintiffs have shown they are or could possibly be entitled to any of the temporary, preliminary, or permanent injunction relief they request.

IT IS THEREFORE ORDERED that the United States' Motion to Dismiss (doc. #37) is granted in part, dismissing all claims against Abe Reyes and all claims against the United States except Beth Krasemann's and Krasemann Eye Center, Inc.'s claims against the United States under 26 U.S.C. § 7426 for wrongful levy.

IT IS FURTHER ORDERED that the United States' request for award of its costs and fees (doc. #37) is denied without prejudice.

IT IS FURTHER ORDERED that Plaintiffs' Petition for Temporary Restraining Order and Preliminary Injunction (doc. #38) is denied.

DATED this 29th day of May, 2008.

Neil V. Wake
United States District Judge